

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION**

CIVIL CASE NO. 1:12cv307

THOMAS DUANE CAIN,)	
)	
Plaintiff,)	
)	
vs.)	ORDER OF DISMISSAL
)	
MICHAEL J. ASTRUE,)	
Commissioner of Social Security,)	
)	
Defendant.)	
)	

THIS MATTER is before the Court on the Plaintiff's Motion to Dismiss Civil Action Pursuant to Rule 41(a)(2) Federal Rules of Civil Procedure [Doc. 10].

Plaintiff's counsel concedes in the motion that this matter cannot be further prosecuted in good faith. Counsel for the Defendant was contacted to ascertain consent or opposition. Defense counsel consents provided that the dismissal is with prejudice. However, 42 U.S.C. §405(g) requires that an action seeking judicial review of a social security ruling must be filed within sixty days of the Commissioner's final decision. Dismissal without prejudice of a complaint seeking review of a social security decision thus

precludes a plaintiff from bringing another action because the sixty day deadline will have passed. Boniella v. Commissioner Social Security, 317 Fed. App'x. 268 (3rd Cir. 2009); Christides v. Astrue, 2010 WL 5387596 (M.D.Fla. 2010) (citing and quoting Bost v. Fed. Express Corp., 372 F.3d 1233, 1242 (11th Cir.), cert. denied 543 U.S. 1020, 125 S.Ct. 656, 160 L.Ed.2d 496, 160 L.Ed.2d 496 (2004)) ("Dismissal of a complaint without prejudice does not allow a later complaint to be filed outside the statute of limitations."). The sixty day time period contained in §405(g) is a statute of limitations. Bowen v. City of New York, 476 U.S. 467, 106 S.Ct. 2022, 90 L.Ed.2d 462 (1986); Cleaton v. Secretary, Dept. of Health and Human Services, 815 F.2d 295 (4th Cir. 1987). The Court will therefore dismiss the Plaintiff's Complaint without prejudice.

IT IS, THEREFORE, ORDERED that the Plaintiff's Motion to Dismiss Civil Action Pursuant to Rule 41(a)(2) Federal Rules of Civil Procedure [Doc. 10] is hereby **GRANTED** and this action is hereby **DISMISSED** without prejudice.

Signed: February 11, 2013



Martin Reidinger
United States District Judge

